Fresh Mark, Inc. d/b/a Carriage Hill Foods *and* United Food and Commercial Workers Union, Local 880, AFL–CIO, CLC. Cases 8–CA–27078, 8–CA–27199, 8–CA–27324

September 5, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On December 14, 1995, Administrative Law Judge Richard F. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Fresh Mark, Inc. d/b/a Carriage Hill Foods, Salem, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, by telling employees that they were demoted from or could not hold certain positions because of their support for the Union, that they probably would have been discharged if the Union had become the employees' collective-bargaining representative, that those employees who were known Union supporters would be subject to strict enforcement of the Employer's work rules, and that the Employer would not go through another National Labor Relations Board-conducted election.

(b) Terminating employees or issuing disciplinary warnings to them because of the employees' union activities and their support for the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Barbara Fryman and Wyman Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole Barbara Fryman and Wyman Davis for any loss of earnings and other benefits suffered as result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Barbara Fryman and Wyman Davis and the unlawful disciplinary warnings to Craig Swanson and Richard Durham and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges and warnings will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Salem, Ohio facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's decision, asserting that it evidences bias and prejudice. Upon our full consideration of the entire record in this proceeding, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis and discussion of the evidence.

In agreeing with the judge that the Respondent violated Sec. 8(a)(3) and (1) by discharging employee Barbara Fryman, we rely on his crediting of her denial concerning her conduct on December 19, 1994, and hence find it unnecessary to pass on the judge's conclusion that even if the conduct occurred as alleged by the Respondent's vice president, it "would fall within the employees' right of free speech and, without more, . . . would not be so extreme as to justify the losing of . . . employees' rights under the Act."

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act, by telling them that they were demoted from or could not hold certain positions because of their support for United Food and Commercial Workers Union, Local 880, AFL–CIO, CLC; that they probably would have been discharged if the Union had become their collective-bargaining representative; that those employees who were known Union supporters would be subject to strict enforcement of our work rules; and that we would not go through another National Labor Relations Board-conducted election.

WE WILL NOT terminate our employees or issue disciplinary warnings to them because of their union activities and their support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Barbara Fryman and Wyman Davis full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Barbara Fryman and Wyman Davis for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Barbara Fryman and Wyman Davis and the unlawful disciplinary warnings to Craig Swanson and Richard Durham and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

FRESH MARK, INC. D/B/A CARRIAGE HILL FOODS

Richard Mack, Esq., for the General Counsel.
Michael J. Shershin, Esq., and *Richard Brown, Esq.*, of Atlanta, Georgia, for the Respondent.
Anthony P. Sgambati, Esq., of Youngstown, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Salem, Ohio, on August 16, 17, 18, and 22, 1995. Subsequent to an extension in the filing date briefs were filed by all the parties. The proceeding is based upon charges filed January 23, March 9, and April 24, 1995, by United Food and Commercial workers Unions, Local 880, AFL–CIO–CLC. The Regional Director's consolidated complaint, as amended, dated May 31, 1995, alleges that Respondent Fresh Mark, Inc., d/b/a Carriage Hill Foods, violated Section 8(a)(1) and (3) of the National Labor Relations Act by changing its practices concerning assignments and overtime, issuing warnings, and discharging certain employees because of their union support and union activities and by telling employees that they were demoted from or could not hold certain positions because of their support for the Union; that they probably would have been discharged if the Union had become the employee's collective-bargaining representative; that those employees who were known union supporters would be subject to strict enforcement of the employer's work rules; and that the employer would not go through another National Labor Relations Board-conducted election.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the processing and wholesale distribution and sale of meats and meat products. It annually ships and receives goods valued in excess of $50,000 from its Salem, Ohio location to points outside Ohio and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the

Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates several plants in Ohio and Indiana. It currently employs approximately 424 employees at its Salem facility which has been in operation for approximately 10 years. On October 31, 1994, the Union filed a representation petition with the Board and an election was held on December 22, 1994, in a unit of Respondent's production, maintenance, shipping, receiving, and warehouse employees. The Union lost the election (184 for, 254 against) by a margin of 36 votes in a unit of approximately 470 voters and a Certification of Results of Election was issued on January 4, 1995.[1] The plants operated by the Respondent in Canton, Ohio (Sugerdale Foods), and Worthington, Indiana (Worthington Packing), have existing collective-bargaining agreements with the Union; however, despite two prior elections involving the same Union at the Salem facility (one in 1988 where the Teamsters were also involved and both lost without a runoff being held) and one in October 1992 the Union failed to exhibit majority status. Neil Gensaft is the president and owner of the Respondent. Steve Kuhn is vice president and Mark Sullivan is personnel manager and each has active management responsibilities at each of Respondent's three facilities. Otherwise, the Respondent's supervisors at the Salem facility (as involved herein) included Walter Fink, director of human resources; Richard Foster, plant manager; David Beltz, microwave department supervisor; Brad Carl, bacon department supervisor; Bob Goode, curing department supervisor; and Les Flores, plant manager.

Organizational activities were intensified in the summer of 1994 by an in-house employees' committee. The identity of the members of this committee was disclosed to Respondent in a letter dated and sent August 11 and there is no dispute that Respondent's management was aware of the named committee members. In early October the Union had achieved a card majority showing of interest and, by letter dated October 31 over the signatures of most of the committee members, it requested recognition as the employees' exclusive representative and demanded bargaining.

Richard Durham, Wyman Davis, and Barbara Fryman were among those who were named as part of the organizing committee in one or both of the noted letters. Durham, an employee for 9 years, overtly showed his support for the Union by wearing insignia on caps and shirts at the plant and at employee meetings conducted by the Respondent as part of its counter campaign. Fryman, also an employee for 9 years, openly showed her support for the Union and at one Respondent conducted employee meeting close to the election, questioned Vice President Kuhn concerning the Respondent's failure to promptly process workmen's compensation claims, an important issue in the Union's campaign. In addition, her husband Bruce Fryman was an employee also active in the campaign (as well as having been active in the 1988 attempt), and he was involved, along with Davis, in the employees' decision to make initial contact with the Union in early 1994. Davis, a 7-year employee, also called and attended union meetings, solicited authorization cards and overtly wore union shirts and stickers. Craig Swanson was a 10-year employee who openly supported the Union and wore union paraphernalia. He also served as the union observer at the election.

After the election Fryman and Davis were discharged, Swanson was given two disciplinary warnings and Durham was allegedly subjected to statements (both before and after the election), from supervisors that threatened his employment status and then was given his first disciplinary warning in his 9 years with the Respondent. These statements and other actions related to the treatment and discipline of these union activists are the basis for the several complaints alleged to constitute unfair labor practices and they will be set forth in detail and evaluated in the following discussion section of this decision.

III. DISCUSSION

The recitation herein of factual statements are my factual conclusions based upon the demeanor of the various witnesses and my evaluation of what is the most credible testimony overall. In general, I conclude that although some of the General Counsel's employee witnesses had an imperfect recall of some dates or details, they otherwise testified in a convincing, believable manner and in instances where testimony to the contrary was placed on the record by the Respondent's witnesses, I find the latter testimony to be self-serving, implausible, and untrustworthy and, I therefore find that it should not be credited over the testimony of the General Counsel's witnesses. This is especially true in the numerous situations where the employee witnesses gave a narrative description of the surrounding circumstances and the Respondent's managers gave bare denials that they had made the statements attributed to them.

Alleged Violations of Section 8(a)(1)

Durham testified that he had been appointed as a crew leader in the bacon department by Supervisor David Beltz, for a period of approximately 2 weeks in late August or early September at a time when another supervisor had been sent to the packaging department (his pay slips, however, show that this happened only on 2 specific days), and, thereafter, on other occasions for an hour or two. From October 28 until November 28, 1994, Durham was absent because of a work related injury and upon his return to work was assigned to a laborer's position, he observed that Respondent was still utilizing a crew leader in the department. Since he had served as crew leader before Durham asked Beltz why someone else had been assigned as crew leader. Beltz responded that he [Durham] had "really fucked up by signing that union letter" ("order" is an error in the transcript which should read "letter" as is clear from Beltz' later testimony). Beltz also stated that Respondent had the right to "pick and choose" who they wanted to serve as crew leaders and that Durham "was considered untrustworthy in the company's eyes." Durham questioned Beltz's characterizations of him as untrustworthy and told Beltz that he "wanted to go over his head." Beltz told him that it would do no good.

The next day Durham spoke with then Plant Manager Foster who was walking through the plant and asked what he had done that was untrustworthy. Durham testified that Foster responded that Durham's loyalties were not with the company anymore but that if . . . [he] wanted to change that he

[1] All following dates will be in 1995 unless otherwise indicated.

[Foster] could give . . . [Durham] an 800 number." Foster told Durham that he could call the number and have his name taken off the letter and have his union authorization card destroyed. During the same conversation Durham asked why his girlfriend, Linda Dixon, was being allowed to serve as a crew leader as her name also appeared on the union letter. Foster replied that "the company has to do what the company has to do to get things done but they make mistakes and it will never happen again." Durham testified that since then Dixon has not served as a crew leader.

Foster acknowledges that Durham spoke to him on November 29 and that the conversation began with Durham's questioning why he could not serve as crew leader. Foster recalled that Durham then expressed belief that the reason for his not being selected was his having been signatory to the union letter. Foster generally denied making statements concerning having made a mistake in having Dixon serve as a crew leader but asserts that he raised Dixon's service as example of such appointment in spite of her having signed the union letter. He, did not refute Durham's testimony that Dixon was never again given crew leader responsibilities.

Beltz denies the statements attributed to him by Durham, however, I find that Durham is the more credible witness. As pointed out by the General Counsel, Durham is a current employee and has literally everything to lose by testifying against the Respondent. In contrast to Durham, Beltz' testimony appears to be self-serving and implausible, especially when considered with the testimony of Respondent's witness Foster.

According to Beltz, Durham wanted to know how he could disassociate himself from the union activity and apparently regain the affection of his coworkers and made no mention of the subject of the crew leader duties. Foster's testimony, confirms that the thrust of Durham's inquiry was his concern over not being allowed to serve as a crew leader. In addition, Foster testified that Durham expressed his belief that his denial of crew leader responsibilities had its origin in his union activities. I agree with the General Counsel that this testimony supports Durham's recollection of the conversation he had with Beltz in late November. Otherwise, my observations of the witnesses lead me to evaluate Durham as providing the more trustworthy testimony and I therefore credit his recollections over Beltz' testimony.

Immediately following the election on December 23, Durham spoke privately with Beltz in an effort to reconcile himself with Beltz and told him that he had "no hard feelings" with respect to the outcome. Beltz was not conciliatory and told Durham that the employees were lucky that the Union lost since they "would have ended up with a Park Farms contract." Durham understood this to be an agreement which acknowledged the Respondent's right to discharge an employee for "attitude" about their job. Durham testified that Beltz then said Durham probably would be one of the first fired and that Beltz would "be the one to escort . . . [his] ass out of there." Beltz then told him that "the company considers people that signed that union letter as hard liners and they had better tow the line because the company will not go through another union election." Although Beltz denied making these statements, I find Durham to be the more believable witness and I credit his recollection of the conversation.

Here, Durham's credible testimony shows that the Respondent made statements that equated union activity with disloyalty to the employer; that implied that Durham would no longer be given higher paying temporary assignments as a crew leader because he had signed the Union's letter; and that the Company would have found cause to discharge Durham and other union supporters if the Union had won the election. It also threatened that union supporters were considered to be "hard liners" because they signed the letter and would be subject to toe the line on company work rules because "the company would not go through another election."

Each of theses statements is coercive in nature and interferes with the employees' Section 7 rights and I find that the Respondent's actions in these respects are shown to be unlawful and in violation of Section 8(a)(1) of the Act, as alleged. See *House Calls, Inc.*, 304 NLRB 311, 313 (1991), *Ed Tech Research Corp.*, 300 NLRB 522 (1990), and *International Door*, 303 NLRB 582 (1991).

Alleged Violations of Section 8(a)(3)

In proceedings involving changes in conditions of employment and disciplinary action against employees, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees union or other protected concerted activities were a motivating factor in the employer's decision to change their conditions of employment or to discipline them. Here, the record shows that the Respondent clearly was aware of the employees' union activity, that it was aware of which employees supported the Union and that it specifically knew that each of the alleged discriminatees was a strong supporter of the Union. It also engaged in certain unfair labor practices, as discussed above, which included statements by Plant Manager Beltz and a department supervisor that clearly showed antiunion animus. Other indicia of record include the timing of Fryman's discharge, which admittedly was specifically delayed until after the Union's loss of the election was certified as official, and, under these circumstances, I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's subsequent decision to change the conditions of employment and to discipline certain of the employees who were among the active union supporters. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.*, supra:

> [A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the Respondent's plant manager made a coercive statement to the effect that the Company would not go

through another election. The Respondent then followed up on this threat by seizing upon the first opportunity to take certain disciplinary actions against four employees who clearly were identifiable as union supporters, even though they were employees who otherwise had long years of service with clean (except Davis), disciplinary records. The mere fact that it did not take any actions against some of the most prominent union activist, such as witnesses Connie McCullough and Rock Reiter, is inopposite, and, under these circumstances, I find that the General counsel has made a strong prima facie showing and that the Respondent's burden is substantial.

Barbara Fryman

On January 10, Barbara Fryman was discharged, allegedly for goose-stepping and giving Respondent's executive vice president, Steve Kuhn, a "nazi" salute. Until her discharge Fryman had not received discipline of any nature. The event leading to Fryman's discharge assertedly took place on December 19, 1994, the day of an annual employee lunch party referred to as the "covered dish." Steve Kuhn testified that as he turned into the drive out of the middle of the Respondent's parking lot, at approximately 4:30 to 4:45 p.m. (prior to the start of the second shift) he saw and waived at Connie McCullough, then observed Barbara Fryman 5 to 6 feet behind McCullough. He said that he briefly made eye contact with Fryman at which time she began to goose step and gave him a "nazi" salute. Kuhn said he was "shocked" and stopped his car before leaving the parking lot and immediately called Corporate Personnel Manager Sullivan on his car phone. He told Sullivan what happened and Sullivan said he would get into it and they agreed that Kuhn would tell owner, Gensaft. Kuhn made no attempt to speak to Fryman and, despite claiming to be extremely upset, he made no written report or notes of the incident, nor any memos of the followup conversations that related to this matter.

Sullivan testified that Kuhn (who is not Jewish), told him that as his eyes met Fryman's she made a motion towards his car giving a "nazi" salute. Sullivan bluntly testified that it was a brief 2-minute conversation and that he made an immediate decision to discharge Fryman based on the information he had. The next day he contacted Respondent's labor counsel and told him he was going to meet with Fryman and terminate her. Counsel advised him that as the election was 3 days away he should wait until after the election. Sullivan spoke again with Kuhn and told him he was going to terminate Fryman anyway. Kuhn advised him to see Gensaft. He did so and was advised to talk to counsel again. He then agreed to wait until after the election.

The election results were certified on January 4. On Monday, January 9, the day after Sullivan returned from vacation, he announced to Kuhn that he would meet with Fryman the next day. He then had Plant Superintendent John O'Dell call McCullough and Fryman separately to Fink's office.

Sullivan did not tell McCullough what was going on and did not ask if she had seen Fryman goose step or give a nazi salute. Instead, McCullough was simply asked if she remembered anything about the date of December 19 (she was then told it was the night of the covered dish dinner). Sullivan then asked if she walked in with Fryman, or remembered seeing Fryman, and if she saw Kuhn that day. McCullough said she couldn't recall and asked what it was about. Sullivan said he would get back to her later when he was finished. He then used the same questioning format with Fryman and after she said she recalled nothing about that day Sullivan then pointedly asked if she had goose stepped towards Kuhn's car and given him a "nazi" salute. She denied doing it and after a further question replied that she didn't even know what a "nazi" salute was. Sullivan testified that he told her that Kuhn wouldn't lie and said:

> This company is owned by a Jewish person. That we do not tolerate any racial remarks like that or racial gestures directed at him or at the company. It is an insult to the owner of our company. That I would not tolerate that . . . I said "You made that gesture to an executive vice-president of this company that was to me an act of willful insubordination and that you would not continue working here."
>
> Sullivan then told her that she "did not like working there" and asked her to resign and sign a letter of resignation that they would prepare. Fryman asked for a lawyer and refused to resign or to sign anything. Sullivan told her that she could get unemployment and a letter of recommendation but she still declined to sign anything. Sullivan told her that if her husband [a known union supporter], came in and "started running his mouth, then he would be out the door also." Sullivan then had a female supervisor escort Fryman off Respondent's property.

Both Fryman and McCullough gave credible testimony describing how they were both carrying boxes and bags with both arms loaded with food or other items for the Christmas covered dish party. This was confirmed by witness Thomas Marrie who had arrived at work early and was having a cigarette in his car in the parking lot and saw both come by carrying "good size boxes" with their hands palm up and with plastic bags hanging from their hands.[2] (Fryman had one bag on her right hand.) He did not see Kuhn drive out and saw no alleged salute or goose step. He also responded (with highly persuasive and believable demeanor), to a question on cross-examination by Respondent's counsel that there was no possible way Fryman could have given a "nazi sign" as it was not in her nature to do something like that, that she is a person easy to get along with, without any racial problems who was never observed to make any derogatory remark towards anyone or ever use the term "nazi" in over 8 years that he had known her.

Here, I also credit Fryman's denial that she engaged in the conduct described by Kuhn and I find that she persuasively demonstrated that she could not have taken the physical action described and that she was not even aware of what a "nazi" salute and goose step were at that time.

Fryman's answers to repeated questions on cross-examination, tend to show that she is singular minded in habit and that she answered in keeping with her deep seated thoughts rather than listening to changing questions or concepts. Her demeanor showed that she was not a sophisticated or broadly educated person and she was born after the events surrounding World War II and the "nazi" or fascist political move-

[2] The Respondent also called employee David Rowe who said he did not see Fryman but saw McCullough carrying a box with both hands and with a bag also.

ments in Europe. Under these circumstances, I find it plausible that at the time of the alleged event she truthfully was unaware of the nature of her alleged conduct.

I also find that Kuhn's description of the circumstances of his observation and what he allegedly saw are unpersuasive and fail to show that he actually saw what he claimed to have seen or that he had any reasonable basis for concluding that Fryman made any specific overt act. Kuhn described how he saw McCullough he had just turned out of the parking rows and straighten out and observed both McCullough and Fryman on the side of his car opposite the driver's side as he accelerated to 10 miles an hour. I find his description of how he observed McCullough give a little wave and then saw Fryman 5 feet behind suddenly salute and goose step to be unreliable and unconvincing. First, McCullough did not wave and she was so burdened that she could not have. Then Kuhn said he "almost instantaneously shifted eye contact from McCullough to Fryman and made intent, strong eye contact with Fryman." While still moving out the drive and "looking at her eyes" he allegedly saw her snap her right hand up and he immediately concluded that it was "quite apparent that there was something going on." I concluded that whatever Kuhn thought he saw did not occur (as Fryman's hands were both supporting a box and bags) and could not have been accurately observed[3] under the circumstance.

Sullivan made no timely investigation, and raised no questions concerning the circumstances and the possibility that Kuhn could have misconstrued his assumption of what seemingly had occurred. He immediately leaped to the flawed conclusions that the purported action not only had occurred but that Fryman's actions were racial gestures directed at the Jewish owner of the Company and were willful acts of insubordination against the Company. Sullivan made an untimely, pro forma inquiry of one potential witness well after the event and well after he reached a firm conclusion to terminate Fryman. His own testimony shows that he was bound and determined to immediately fire Fryman without regard to its affect on the validity of the forthcoming union election, a subjective mind set that clearly shows that he had little regard for the rights that are guaranteed to employees. Although he was dissuaded by Respondent's counsel, he merely delayed the implementation of his decision until after the election results were certified. His approach to the questioning of Fryman and potential witness McCullough in his mock "investigation" was clearly biased and unobjective and (as he told Fryman), he clearly had already accepted Kuhn's statement as the unalterable truth.

Despite the passage of time between the alleged incident on December 19 and the termination on January 10, no effort was made to involve Director of Human Resources Fink, who normally would have been involved in any termination action taken at the Salem facility. This precluded the possibility that Fink might have observed that the Respondent's action would be in apparent conflict with Fryman's clean record and its own progressive disciplinary policy. Sullivan also testified that Respondent only disciplined for racial incidents if a "minority person is offended by that and hears it and comes and reports it . . ." events that did not occur here.

The Respondent attempted to attack Fryman's credibility with the testimony of security guard Clyde Hoopes who testified that sometime in December on 1994, Fryman referred to him as being like the rest of these "nazi bastards" for making her move her car in the parking lot. Hoopes' memory was specific as to the time (late morning to noon), and car involved.

The record, however, shows that Fryman worked the second shift all during that time, and would not have been at the plant during the middle of the day. Fryman also was not on vacation at any time during that winter, and would not have come in early to pick up her check as Respondent does not allow employees to pick up their checks early if they are working.

Hoopes specifically testified that Fryman was driving a red S-10 pickup truck that day. Fryman did not own a red S-10 pickup truck at that time as the truck she had owned had been sold in May 1994 (as shown by a transfer of title), and thereafter Fryman did not drive any truck type vehicle. Fryman also denied she ever had any parking confrontation with any security guard.

Hoopes, who normally does not monitor the 400 employees entering the plant or know them by sight, responded to a question from the bench that he did not have any particular reason to know Fryman's identity nor had he heard anything about her. He then admitted that it possibly could have been another person but then apparently regretted this admission and insisted that it was Fryman. Hoopes made no report or note of the incident and did not convey the information to the Respondent until shortly before the instant hearing. Otherwise, Sullivan had no knowledge of Hoopes' story at the time he terminated Fryman. The record was also developed to show that Hoopes' son began working for Respondent through a temporary agency called Callas Personnel Services shortly before the hearing. Although the son is a temporary employee, Respondent's normal hiring pattern is to take employees from a temporary agency and eventually hire them full time.

Under all these circumstances, I find that Hoopes testimony is not trustworthy or reliable and I find that there is no showing that Fryman could have been the person involved in the alleged incident with Hoopes. Accordingly, I find no reason to question Fryman's overall credibility.

Here, the record shows that the Respondent's actions in regard to Fryman's alleged conduct involved a pretextual investigation, that the discipline went far beyond its standard practices, that its actions were not based on an accurate or reasonable understanding of what may have occurred, and that Sullivan's actions were clearly tied into the intervening union election. Accordingly, I find that there is no persuasive evidence that the same action would have been taken even in the absence of the protected union activity. Furthermore, as shown below, the Respondent's actions with regard to Fryman were not isolate but were part of a pattern whereby it selectively took advantage of a seeming opportunity to retaliate against union activists in furtherance of its stated threat that it would not go through another election. Accordingly, I find that the General Counsel has carried his overall burden and shown that the Respondent violated Section

[3] It is noted that the time was between 4:30 and 4:45 p.m. on December 19, 1994, the next to shortest day of the year, it is possible that Kuhn saw some moving shadows that gave rise to his speculation that Fryman suddenly was treating him with disrespect but his testimony falls far short of indicating that what he surmised had occurred, actually could have happened.

8(a)(1) and (3) of the Act when it terminated employee Fryman.

This conclusion is based on the persuasive showing that Fryman did not engage in the conduct she was accused of and the fact that Sullivan followed none of the reasonable or usual practices that would have a occurred in the absence of an illegal motivation for its actions. I also find that the Respondent has not shown valid and persuasive reasons for terminating an employee even under the alleged circumstances.

Absent words, signs, or other actions it is not clear that the making of a "nazi" salute and goose step is an anti-Semitic or "racial" statement. It would appear that these actions could be plausibly interpreted as a political type statement charging that the company was the perpetrator of fascist type actions in its labor relations with its employees. As such it would fall within the employees' right of free speech and, without more, its use would not be so extreme as to justify the losing of an employees' rights under the Act.

Craig Swanson

On January 9 and again on January 11, Craig Swanson was given written disciplinary warnings. Swanson is a 10-year employee who has been a forklift operator for the last 5 years and had no previous disciplinary record. As noted above, he was an open union supporter and served as the Union's observer at the December 19 election.

On the morning of December 27, 1994, the first workday after Christmas, Production Coordinator Joseph Dade was standing outside a production area when he saw Swanson coming down the dock area on a forklift and purportedly made eye contact. Dade started walking in the same direction, then noticed that Swanson appeared to be headed toward him but was not looking at him. He therefore "jumped" back out of the way and observed that Swanson was now looking ahead and did not look back. Dade said nothing but went about responding to a call on his pager. He thereafter saw that Personnel Manager Fink's door was closed and continued about his normal business and then when he noticed Fink's door was open around 1:30 p.m. reported the incident to Fink, who asked him to make a written report which he gave to Fink on the December 28. After January 9 Swanson saw him and apologized for "almost hitting" him and explained that he had not seen him.

Swanson was on vacation the first week of January and was called to Fink's office on the January 9 and given a warning. When Swanson said he thought he shouldn't be written up for it Fink replied that it wouldn't change and would go up in his personnel file. On January 9, Fink also criticized Swanson about the manner in which he had picked up his paycheck from the office on January 4, while he was on vacation, but was not told he would be written up for the incident.

On January 4, Swanson had arrived a few minutes before 11 a.m. and was told by clerk Marcy Chamberlain that he had to wait until 11 a.m. When he came back he believed that Chamberlain appeared to be "aggrieved" over something and gave him the check in a flipping manner (quickly turning her hand over) and he took it in a similar manner, flipping it back to himself, without making any comment. On January 13, Fink gave Swanson a written warning dated January 11, because he "ripped" the check from Chamberlain's hand and he was admonished to treat fellow employees courteously.

Chamberlain testified that Swanson had come in twice before 11 and been rebuffed by her and that the second time he had said "something" under his breath that she didn't hear. She said he then "yanked" the check from her hand and gave her a "dirty" or "nasty" look, muttered to himself and "stormed out of the office." She then reported to Fink and Sullivan that Swanson had acted very "mad and angry" at her for making him wait until 11 a.m.

The record shows that other discipline has been given to other employees who had shown discourtesy to Chamberlain and the office staff. In each of these warnings the employee is described as having been "belligerent," "vulgar," "immature," "verbally abusive," or a combination of these. In those cases in which details of the incidents are provided, the conduct including loud, vulgar, and profane language and physical actions such as throwing oneself against a wall.

The record also reflects that apart from Swanson, no one has been disciplined for a near miss, that two forklift operators had previously been involved in actual accidents and had not been disciplined, and Swanson (before he engaged in any union activity), had accidentally hit an employee and had not received discipline. Respondent's records otherwise showed that any discipline regarding forklift operation occurred only where injuries or serious misconduct had occurred.

Fink testified that he made the decisions to warn Swanson because of his concerns for safety and to uphold "professional" standards of conduct in the payroll office consistent with its past actions. He also testified that when he called Swanson to his office he told him he would be given written warnings.

Here, the Respondent did not call Swanson to investigate the matters but to present the already prepared warning and announced the discipline before even speaking to him about what may have occurred. Clearly, no consideration was given to the possibility that Dade was careless and contributed to the apparent near miss by walking out into the dock area when he saw a forklift was entering the same area, or to consider that Chamberlain could have provoked some treatment in kind by acting in some less than "professional" manner herself or that the specifics of Swanson allegedly "angry" conduct did not rise to the level of serious misconduct.

On January 9 Fink already was aware of the action pending against Fryman as well as the January 4 certification of the election results in favor of the Company and it is clear that Swanson became one of the more visible union proponents by his acting as election observer only 3 weeks before receiving his first disciplinary warning in 10 years with the Respondent. Despite the Respondent's claims to the contrary, its actions in regards to Swanson are not shown to be consistent with its past actions in similar circumstances.

Here, I conclude that the Respondent seized upon the first available minor incidents involving a prominent union supporter and disparately escalated them into conduct requiring disciplinary action. The Respondent has not shown that it relied on legitimate reasons for its actions and I find that its alleged justifications for the warnings are unpersuasive and that they do not show that he would have had these two disciplinary warnings placed in his record even in the absence of his union activity. This is especially true in light of its failure to investigate the specific nature of the complaints,

the timing of its actions, and the minimal adverse nature of his conduct as compare to other employees and the discipline they did or did not receive. Accordingly, I conclude that the General Counsel has met his overall burden and shown that the Respondent's warnings to this employee were made in violation of Section 8(a)(1) and (3) of the Act, as alleged.

Richard Durham

On March 13, Durham was working with other employees as a stacker on a machine which stacks slabs of bacon preparatory to packaging. When the machine malfunctioned another employee summoned Supervisor Brad Carl (who had recently been hired), who was unsuccessful in his attempt to fix it. Durham offered to help him saying that his "West Virginia" hands could fix what Carl's couldn't. Carl responded that "being from West Virginia you must f__ck your sisters." Shortly thereafter, Carl came up to Durham, threw a slab of bacon in front of him and obscenely asked him "just what the f__ck it was." Durham understood Carl to be questioning the manner in which he had just graded the bacon when Carl said that it wasn't good enough to be a number one product that it should have been put in a number two box. Durham responded that he "had been grading that way since I had been here and you have only been here a short time and the last supervisor that we had that was this strict we sent him back to Iowa."

Durham then observed Carl speaking with Plant Manager Les Flores who later admonished Durham to show respect to supervisors and to watch how he spoke to them or he "wasn't going to be there." Durham said he was disturbed by the manner in which he had been spoken to by Carl and went to speak with Human Resources Director Fink, who in turn arranged a meeting with Plant Manager Flores. During the meeting Durham quoted Carl on several occasions. In response Durham was told that he could be fired for using "the F word" and for "cussing" in a company meeting. He asked why a supervisor could do it in the plant but I couldn't quote him and he was told what a supervisor does is the company's business and none of his and that he was to respect them for their job title not what they deserve.

A day or two later Durham was summoned to a meeting with Fink, Carl, and Beltz. He was read and presented with a written warning for challenging supervision in a threatening manner. Durham's request that employees be questioned concerning Carl's use of vulgarity in his dealings with employees but Beltz refused Durham's request and his request that he acknowledge that Carl's language had been the source of complaints by other employees. He was informed in the written warning that if he challenged supervisory authority again or was disrespectful he could be terminated.

As otherwise set forth above, Durham was subjected to certain statements by the Respondent that are shown to have violated Section 8(a)(1) of the Act and these statements were related to the time when Durham returned to work and was not given further assignments as a crew leader and thereafter was given reduced opportunities for overtime. In the latter situations the Respondent has shown that it had valid business reasons for reducing the 15-minute overtime at the start of a shift (starting times were rearranged to eliminate the need for the overlap and to reduce cost), and that Durham had only been a crew leader on two, irregular occasions. The record also shows that the situation involving the regular crew leader (Bill Leyman), had changed and that Durham did not have a preeminent claim for that position and I am persuaded that these actions would have occurred regardless of Durham's involvement in union activity.

The situation involving the March warnings issued to Durham is quite different and I can find no persuasive reason that would indicate that the Respondent had any valid reason for finding that Durham was somehow the wrong doer after he initiated a complaint to management about his supervisor's conduct. Durham's defensive rejoinder to Carl, at the very least, was provoked by Carl's intolerant behavior and I find that Durham's action was too innocuous to warrant the heavy handed warning given on March 15, especially since Durham's actions were in no way shown to have been "threatening" nor did they show "unwillingness" (or refusal) to "comply with instruction," or to "correct inefficiencies that result in substandard and defective work," as alleged in the warning. Moreover, Durham was experienced as a bacon grader, had no demonstrated previous problems, the supervisor was new to the job, and management made no effort to investigate Durham's plea that other employees could corroborate the nature of Carl's behavior toward line employees. It appears that the written warning of the March 15 grew out of Durham's protective union activity and his conduct in having the apparent audacity to complain to management about his supervisor's obscene disregard of an employee's rights to have a work environment free of such gross hostility. The first warning from Flores was given without the benefit of any investigation on Flores' part and it was supplemented by the gratuitous threat that Durham would be fired if he didn't watch himself. Both warnings were extreme in their exaggerated tone and otherwise they are not shown to be justifiably related to the nature of Durham's alleged office. Moreover, the Respondent's disingenuity in warning Durham that he could be fired for using cuss words in a company meeting (his complaint about Carl's conduct), shows that it would not respond to or fairly investigate any complaints from him and it gives further support to the conclusion that its decisions regarding Durham were motivated by his recent union activity and by their desire to preclude any other attempt by the employees to seek another union election.

Here, I conclude that the Respondent has failed to persuasively show any legitimate reasons for its warnings to Durham and it has not shown that warnings of this extreme nature (each accompanied by a threat that an employee with a clean disciplinary record would be or could be fired), would have been given even in the absence of Durham's union activities. Accordingly, I further conclude that the Respondent's warnings to employee Durham are shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

Wyman Davis

On March 21, Wyman Davis was discharged after 7 years as an employee. Davis was the employee who made initial contact with the Union in early 1994, and, as noted above, he was active in calling and attending union meetings and in soliciting authorization cards.

During the first week of February, bacon "belly pump line" Supervisor Bobby Goode, announced that changes were going to be made in the composition of the crews, change that consisted of moving only two crewmembers, re-

sulting in Davis, Roch Reiter, and Mike Gobel were assigned to work together on the third pumper. In addition, the crews were no longer permitted to rotate among the pumpers. The salient characteristic shared by the three men, in contrast to the other crews, was that they had openly support the Union by wearing various insignia. Another change was made involving more restricted restroom breaks. Prior to February when an employee had to take a restroom break he attempted to secure a temporary replacement. If no replacement was found he could leave the line for a brief period which would cause a very short shut down of the line. In February, Goode told the crews that they could not leave the line for a restroom break unless relieved by a supervisor, the "jack operator," or operator. While on his line on March 15, Davis urgently needed to use the restroom facilities. He made several efforts to get a replacement but no one would help him in spite of the fact that the first pumper line was down because of a mechanical problem and the crew was idle. Supervisor Goode was not in the area and Davis did not see him. Goode was in a plant office adjacent to the belly pump line in conference with his supervisor, Richard Foster, then production manager. Davis testified that he could not see into the office and that he would have had to leave the line to find Goode which also would have shut it down. Davis left the line for three to five minutes without a replacement and, after he returned to the line, Davis and his fellow crewmembers were summoned to a meeting with Goode and Foster (again shutting down the line). Foster accused Davis of leaving the line just "to be smart" and then told him that he didn't believe that Davis had to "go to the bathroom." Without providing Davis with an opportunity to respond, Foster ordered the men to return to work. That noon, Foster took the opportunity to bring Davis' trip to the bathroom to the attention of Personnel Manager Sullivan, as well as Local Personnel Director Fink. Foster (who acknowledged that he knew of Davis' union involvement) said that he called Sullivan because he had "a situation that I figured (he) needed to get involved in" and he thought that Sullivan could followup on the situation because Fink was scheduled to be out of town the following week. Sullivan acknowledged that when he was called he recognized the name "Wyman" from the union literature.

On March 21, Davis was ordered to Fink's office. He arrived to find Sullivan there reviewing his file in the presence of Supervisor Goode. Sullivan started by saying that he did not know Davis and Davis responded that it had been Sullivan who hired him. Sullivan replied, "[W]ell, that was a mistake." A discussion took place during which Sullivan expressed doubt that Davis had had to use the restroom and proceeded to share a story with Davis concerning a personal experiment he conducted which lead to this belief. Sullivan also said Davis had stopped production which was a dischargeable offense and Sullivan made derogatory comments concerning Davis' prior attendance warnings and alluded to a prior disciplinary suspension of 3 days in December 1993 (Sullivan testified that Respondent never removes any disciplinary warnings from the personnel files of employees at nonunion facilities), and said that he thought Davis' present problem was a continuation of that discipline.

Sullivan asked Davis what he thought the next step should be and Davis suggested another 3-day suspension, because he did not think his leaving the line for a restroom break warranted discharge, Sullivan countered "progressive discipline is warning, time off, discharge." I credit Davis' testimony that Goode and Sullivan caucused privately and upon returning to the room Sullivan first asked him how he expected to support his family. Davis told Sullivan he had not given it any thought and then asked if he resigned would he be permitted to receive unemployment and a good reference. Sullivan testified that Davis first said he couldn't afford to lose his job and that he then said, "[T]his is a very serious offense," after which Davis then asked, "[W]ell, if I resign, will I be able to get unemployment?" Sullivan said he discussed it with Fink and Plant Manager Flores and then typed up a brief note to say that Davis "voluntarily" resign under the following conditions:

1. My termination will be for lack of work.
2. The Company will not challenge my unemployment.
3. Any future references will be handled by Walt Fink and the reason givento any prospective employer will be "laid off without recall rights."

The record otherwise shows that on the day following Davis' leaving the line employee Randy Cassidy did the same thing. David and witness Reiter both observed Cassidy leave the line to rush to the rest room without first securing a substitute, which caused the line to shut down. Supervisor Goode, who was working on the ham stuffing line at the time, came to the belly pump line only after he became aware that the line was down. Although the content of the conversation was not overheard, Goode was seen to speak to Cassidy when he returned to the line. Cassidy admitted that the incident occurred and that he was not disciplined for this infraction. Reiter also testified that there have been subsequent similar incidents of workers leaving the line without first having secured a replacement which resulted in temporary shutdowns.

My review of the circumstances surrounding Davis' termination lead to a conclusion that he had already been terminated for cause when he was induced into executing a "voluntary" resignation in order to obtain uncontested unemployment compensation benefits. Davis had no real opportunity to reflect upon his action and Sullivan went so far as to type the resignation himself in his haste to obtain it. The "resignation" was obtained after the information that termination was preordained already had been communicated to Davis, and I find that it was not "voluntary" (despite Sullivan's use of that word) inasmuch as it was imposed upon Davis in haste and under an atmosphere of duress. It also is noted that Sullivan had used the same ploy with Fryman when he fired her and then asked her to sign a letter of resignation that he would prepare so that she could get unemployment benefits.

It was clear to Davis that he would not be suspended again but would be fired for his "very serious offense" and that it would be futile for him not to resign with an assurance of at least unemployment benefits. The purported resignation was not voluntarily in fact but was merely a device whereby the Respondent attempted to provide a "cover" for its illegally motivated termination, and I find that the overall circumstances are in the nature of a constructive discharge that

will not limit the Board from the enforcement of employee rights arising under Section 7 of the Act.

Here, there is ample evidence to show that Davis left his production line under adverse circumstances, that coworkers from a nearby shutdown line were in a position to fill in but did not respond (and were not admonished for not doing so), that management prolonged any delays in production by shutting down the line for a meeting with the three employees on Davis' line (thereby bringing into question the seriousness of Davis' 2 to 3 minute absence from the line), that production goals for March were being met, and that a similar incident involving a employee who was not a union supporter was allowed to pass without any discipline (I specifically discredit any implication that Supervisor Goode somehow gave Cassidy permission before he rushed off the line). Moreover, the overall record shows that Davis was considered to be a good producer and also shows that Davis' case was handed in an irregular manner, and that it was immediate escalation into a matter which called for the personal involvement of Sullivan, the corporatewide manager of personnel. Under these circumstances, and in view of Sullivan's clearly insensitive attitude towards Davis, I find that the Respondent has failed to persuasively show that it would have taken this extreme action in the absence of Davis' union conduct. I also find that the Respondent's discriminatory punishment of Davis, only a few months after the election, is totally consistent with Respondent's other acts of illegal conduct (whenever it had a seeming opportunity), against Fryman, Swanson, and Durham and I conclude that the General Counsel has carried his overall burden and shown that Davis did not voluntarily resign but was discharged by the Respondent in violation of Section 8(a)(1) and (3) of the Act, as alleged, see *Dunham's Athleisure Corp.*, 318 NLRB 622 (1995).

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce with the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees that they were demoted from or could not hold certain positions because of their support for the Union; that they probably would have been discharged if the Union had become the employees' collective-bargaining representative; that those employees who were known union supporters would be subject to strict enforcement of the Employer's work rules; and that the Employer would not go through another National Labor Relations Board-conducted election; the Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By terminating employees Barbara Fryman and Wyman Davis and by issuing disciplinary warnings to Craig Swanson and Richard Durham because of the employees' Union activities and their support of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

5. Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate employees Barbara Fryman and Wyman Davis to their former jobs or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date or reinstatement in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

The Respondent also shall be ordered to expunge from its files any reference to the discharges and to the illegal warnings given to Craig Swanson and Richard Durham and notify all these employees in writing that this has been done and that evidence of the unlawful discharges and warnings will not be used as a basis for future personnel action against them. Otherwise, it is not considered necessary that a broad Order be issued.

[Recommended Order omitted from publication.]

[4] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.